TJ v CV & Ors [2007] EWHC 1952 (Fam)

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Application by biological parent seeking contact and parental responsibility for his son who is now part of the applicant's sister's same sex family. No parental responsibility order made and a limited contact order granted.

The applicant's sister, S, was in a stable civil partnership with CV. They had various unsuccessful attempts at creating a family before turning to the applicant as a possible sibling sperm donor. This was agreed and CV successfully gave birth.

The applicant's case was that the three of them had agreed he would have regular contact and a role in major decision-making whereas S and CV maintained that he was merely to have an avuncular role. The disagreement had caused the parties to become estranged.

In this judgment Hedley J observes that the depth of feeling caused by such arrangements often comes as a shock to those involved. However he had to consider the issues from the viewpoint of the child's welfare. He concluded that giving the applicant parental responsibility would not be wise as he would be likely to use it to force greater involvement in the future. He also rejected any form of restricted parental responsibility but was reluctant to dismiss the application as the essential conditions for parental responsibility had been met: he therefore made no order.

He did make on order for contact as the child needed to know from an early stage that the applicant was more than just an uncle as that fact would inevitably be revealed at some stage. However the contact was restricted to four occasions a year as it was not intended tat such contact should develop a relationship that might be considered parental. He also made s91(14) orders against all the parties so as to give the family a break from litigation.

Neutral Citation Number: [2007] EWHC 1952 (Fam)

Case No: FD06P00783
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2007

Before :

THE HONOURABLE MR. JUSTICE HEDLEY
- -
Between :

TJ (Applicant)

- and -

CV

S (1st and 2nd Respondents)

-and-

BA (by his Guardian ad litem Mr James Johnstone)

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- -

Applicant in Person
Miss Joanna Dodson, Q.C. and Miss Janet Plange, Junior (instructed by Burton Wood, Solicitors) for the 1st and 2nd Respondents
Mr Alan Inglis (instructed by Creighton and Partners, Solicitors) for BA

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Hearing dates: 18th and 19th July 2007

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Approved Judgment
I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR. JUSTICE HEDLEY

This judgment is being handed down in private on 9th August 2007 It consists of ten pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The Hon. Mr. Justice Hedley:
1. This judgment is being given in open court as the case raises a number of issues which ought properly to be considered and resolved in the public domain. In particular it raises the question of the proper place of the biological father in a same-sex female family intended to be self sufficient. I remind everyone, however, that nothing may be reported which might reasonably lead to the identification of the child the subject of these proceedings who will be known as BA and who was born on 13th January 2006 and so is a little over 18 months of age.

2. Miss CV and Miss S are now Civil Partners but have in fact been in an intimate relationship for many years. For a long time now they have wanted to have a child. It is quite unnecessary to set out the details of their attempts; suffice it to say that both had repeatedly tried and had been repeatedly unsuccessful, though S had conceived but had more than once miscarried. Thus it was that they returned from the USA in 2004 having made extensive use of a clinic in California.

3. S has two brothers: Mr I is married with four children and lives in Denmark, whilst Mr TJ is single and lives in England. Their father is still alive and he too features in this case. I shall refer to him as PGF. Before they left to go to the USA, there had been some conversation between CV and S on the one hand and TJ on the other about his assisting CV to conceive. Nothing came of it then though the idea of a sibling donor was revisited upon the return from the USA. What then happened will have to be considered in some detail but it is necessary to record here that CV did indeed conceive and BA has as his biological parents CV and TJ. He lives, of course, in a nuclear family comprising CV, S and himself.

4. TJ wishes to establish his role as BA's father. He accepts that BA will be part of a nuclear family of which he will not be a member but he seeks both contact and parental responsibility. The latter application he did not pursue at an application before Bennett J on 22nd March 2007 and its revival has brought shock and dismay to CV and S. Whilst I can well understand their feelings about this, I share the guardian's view that it is in the interests of both BA and the adults concerned that I should resolve this issue now one way or the other. TJ also seeks contact: he suggests something like monthly visiting contact at a contact centre. S and CV say that the most they could contemplate would be an annual contact in a family setting. BA has met TJ twice this year in the context of a supervised contact session.

5. Two matters will be readily apparent: first that there is no normative pattern for contact in cases like this; and secondly, with developments in IVF, AID as well as Adoption, this kind of problem is likely to become increasingly common. My attention has been drawn to a decision of Black J called *B -v- A, C&D* [2006] EWHC 0002 (Fam). These cases are all, of course, fact specific and, despite a number of similarities, the

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essential facts were quite different in that case to this case. Nevertheless I would like to associate myself with what the learned judge said at paragraphs 31 and 32 of her judgment – 007-3

> 31. Same sex family arrangements already receive a considerable degree of recognition from the courts. In *re G (Residence Same-Sex Partner)* [2005] EWCA Civ 462, for example, the Court of Appeal, granting an appeal, made provision for a shared residence order in favour of an applicant who had lived in a same sex relationship for 8 years during which her partner had conceived 2 children by artificial insemination by an anonymous donor, thereby conferring parental responsibility on her for the children. Giving the judgment of the court, Thrope LJ commented that the authorities demonstrate the evolution of judicial acceptance of the diversity of the family in modern society and made reference to authorities both in the family law field and outside it. We have come a long way from the days when a mother who began a lesbian relationship might well have found that it meant she was not permitted to have care of her children.
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> 32. The speed with which the law responds to social change is not uniform. Sometimes change is well advanced and accepted in society before there is legal recognition of it. At other times, Parliament or the courts react to the prompt of a minority and are in the vanguard of change. Sometimes legislation is actually passed to provoke change – anti-discrimination provisions are perhaps an obvious example of this. It cannot be assumed, therefore, that the majority of the population necessarily supports the provision of the Civil Partnership Act or the provisions of the Adoption and Children Act which will permit adoption by a same sex couple.

6. Traditionally the role of the judge hearing family law cases has been to decide them by reflecting and applying the broadly agreed norms of society. That is no longer always possible for in the increasingly complex routes by which family groups come into being or realign, it is often not possible to identify norms which a judge could be confident would be widely shared. That has required the judge to adopt the unfamiliar role of suggesting and then applying principles which should govern these new developments. Of course the basic principle of the paramountcy of the welfare of the child remains the crucial determinant but the basis upon which welfare is identified in an individual case is much less clear. The conventional English approach has been to decide each case on its own facts and that approach is of course binding on me. Nevertheless I am conscious of two factors from which it seems to me there is no escape. In the first place, this case cannot be resolved without some general consideration (principally but not exclusively from the viewpoint of the child) of the continuing role (if any) of the biological progenitors, male or female, in the life of that child. Secondly, each step lays the ground for the next one in the next case and a judge should not reject all consideration of where logically the individual decision that has to be made may lead in other cases.

7. As I turn to the individual features of this case, it is necessary to say something about all the principal participants for this case, like every other, is shaped by the personalities, strengths and weaknesses of the individual human beings involved. I start with the most important person, BA himself. He is a happy and charming boy whose current needs are well met by CV and S. He is clearly well attached and that would in part explain why his contact with TJ went smoothly. The issues in this case are much more concerned with his longer term welfare: his information about his origins, the role of another in that, the genetic makeup so transmitted, the question of male role model and so on.

8. Then there are a number of people who are (or should be) important to BA but who figure peripherally in the case. CV has a sister V. There has been some kind of relationship between her and TJ. However, as I do not consider it relevant to the outcome of this case I say no more of it. CV's parents have a place in BA's life. That is not really true of PGF and that is because he is seen as too closely aligned with TJ; as I refused TJ's application for PFG to act as a type of McKenzie friend, those concerns are clearly not without foundation. However, S made it very clear in her evidence that PGF should have a future role in BA's life. The other person I should mention is 'I' who is clearly seen as the major support on S's side of the family. In her evidence she told me that 'I' finds the whole situation 'incredible' but he is a fine father himself and understand the motivation of CV and S.

9. Before going on to consider the three principal participants, it is necessary to say something about the conduct of the hearing. Having read the reports of both the guardian and Dr.S, the eminent child and adolescent psychiatrist instructed in this case, I had serious concerns about how I would obtain the evidence of CV and S so heightened were the anxieties in this case. Moreoever, TJ was acting in person in this case 007-3

with the right to cross-examine both S and CV. In those circumstances I exercised a rigorous control over the taking of oral evidence. I am grateful to CV and S for ensuring that I could take their evidence and I am grateful to TJ both for his restraint and his willingness to follow my restrictive guidelines. I am satisfied that in the event I have received, heard and understood the evidence which all three wished to give.

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10. The written statements in this case abounded with allegations of lies told by others and invitations to the guardian and to Dr.S to allow parties to set out the lies which they said had been told. In the event I was surprised but quite convinced that, with the exception of one matter, all three made a determined effort to deal honestly with me. The problems in this case, real and profound as they are, are less the product of dishonesty than of anxiety, suspicion and rank bad communication.

11. CV was obviously the gentlest and most sensitive of the three. For that reason perhaps she was the most obviously emotionally hurt as well. She has found real satisfaction in being the prime carer for BA and she has clearly done so to a high standard. TJ freely acknowledged that that was so. I am satisfied that on almost all matters she told me the truth as she believed it to be but she made very clear her own doubt as to her ability to manage any role for TJ in the life of BA other than the most peripheral. I do not believe that in her views, however extreme, she was actuated by malice though I strongly suspect that the depth of her emotional engagement and hurt has come as both a surprise and a shock to her.

12. S, if I may be permitted to say so, was an altogether cooler customer. She had undoubtedly experienced an unhappy childhood. She had also experienced much unhappiness as an adult. However, she came across as clear, rational and thoughtful. In fact in my view that concealed a degree of true hurt that she was unwilling or unable to recognise. I am satisfied that she sought to tell me the truth as she believed it to be nor did I detect malice in her. Her approach was neatly captured in the second contact which BA had with TJ at which she was present. She had ensured that BA attended contact and did absolutely nothing to disrupt, inhibit or discourage the contact. By the same token she did nothing positive. She did what she believed she should do: no more and no less. I am sure that the experience was difficult for her just as I am sure she could continue to do it if necessary.

13. In her summary of her discussions with TJ, Dr.S said, "You get what you see." That was in my view an accurate assessment. TJ has clear ideas about what is right and a clear recollection of what in his view has happened. He finds seeing things from another's point of view very difficult and he is quite rigid in his own thinking. He is also very able to articulate his position clearly and forcefully. On a couple of occasions he has lost his temper but on each occasion he promptly withdrew until he had composed himself; one occasion was in a pub in Greenwich whilst CV was pregnant and the other was in a family group conference. Whilst I readily understand therefore why CV and S should find him aggressive, I do not believe that was his intention. Subject to one matter, I found that he sought to tell me the truth and that his motivation was genuine and not malicious.

14. I propose to deal first with the uncontroversial matters. After the various failed attempts at conception, CV and S decided to explore again the possibility of a familial donor. They approached TJ. He expressed himself genuinely flattered and interested. In due course they agreed that his sperm would fertilize CV. They had discussions, perhaps three in all, about this and about the future. It is clear that all agreed that the child would grow up in a nuclear family unit that would not include TJ. They did not discuss this matter with others or formalise an agreement let alone take any professional advice. TJ did indeed enable CV to conceive. All parties agree that their discussions were not well managed.

15. At this stage all three believed that they were on good terms and were proceeding in accordance with an agreed plan. This changed radically some three months into the pregnancy and since then CV and S on the one hand and TJ on the other have been and remain deeply estranged. One of the difficulties that I have observed time and again where artificial or unconventional means of creating a family are employed, is that depths of emotions are engaged and feelings released that come as a surprise and a shock not only to others but in particular to the participants themselves. Just as we rightly ask as a society whether our capacity to manage the consequences of our technological skills ethically keeps pace with the advance of those skills, so we may have to recognise that our understanding of the psychological consequences of our technological skills is very incomplete.

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16. CV and S, who now believe the involvement of TJ to have been an awful mistake, ascribe the breakdown in relationships to the increasing determination (as they saw it) of TJ to assert his role as a father to the child and (again as they saw it) his aggressive advocacy of that position. In fact, apart from an explosive meeting at a pub in Greenwich and family conferences organised during these proceedings, the parties have not had direct contact with one another. CV and S believe that nothing other than a rather distant avuncular role was agreed for TJ, certainly nothing that could be equated with fatherhood and it was his refusal to accept that or his attempt to renege on it that has brought about the present impasse.

17. TJ, on the other hand, is convinced that a real, albeit limited, role was agreed for him as a father which involved both contact and some role in major decisions in the child's life. That view has, if anything, hardened over time. In order to evaluate this it is important to recognise the context as TJ saw it. He was a single man. He had had two serious relationships, both childless. He saw this as a chance, perhaps his only chance, to be a father to a child and he was greatly excited by it. I have no doubt that those were and remain powerful factors in his thinking. For him issues of parental responsibility are of equal importance with those of contact.

18. I am quite clear that there never was a meeting of minds in this case. The urgent, even desperate, desire of CV and S to conceive and have a child coupled with the possible fulfilment of TJ's dream of becoming a father, completely overbore the need for rational discussion and agreement over how things were to be managed in the future. In their quest for action each heard exactly what they wanted to hear and excluded everything that did not fit with their aspirations. It was a recipe for disaster and so it has transpired. That is why I said earlier in this judgment that the issues are less the product of dishonesty than they are of anxiety, suspicion and rank bad communication.

19. There is, however, one issue on which either CV or TJ have told the court a flagrant lie and that relates to the actual manner of conception. It is important to record that S played no part in this. Not only was she ignorant of what happened but she had not taken any part in the discussions as to how conception was to be achieved. She believed (and was intended by CV and TJ to do so) that CV would artificially admit TJ's fresh sperm into her body. Clearly S did not want to be present for that and was understandably content for CV and TJ to deal with that themselves.

20. CV's case is that that is indeed what happened and she successfully conceived as a result. TJ's case is, however, that CV conceived as a result of normal sexual intercourse with him and that that intercourse took place on a number of occasions albeit over a short span of time. TJ says, moreover, that such intercourse was mutually enjoyable and not devoid of feeling. Whilst the truth hardly matters from the child's point of view, it is easy enough to see how and why this has become a major issue between the parties.

21. CV maintains that this was simply a family agreement in which TJ was kindly offering to assist S and her to realise a deeply held aspiration. She maintains that her relationship with S is sexually exclusive and that she never had intimate feelings for TJ. He maintains the opposite and points to one e-mail communication (albeit from him) in 'endearing' terms. I have already concluded that so far as I can see neither has been actuated by malice. CV points out that this allegation was not made until proceedings were well launched; TJ responds by saying that he had not intended to raise the point until CV in her statement specifically asserted artificial means of conception. Those are the matters that I have been invited to consider.

22. I have reached a clear view that, whatever my views may be, I should decline to decide this issue. It is irrelevant to the future of BA. It would not affect my view either way (given my other findings about them) of CV or TJ in terms of the part they may play in BA's future. I greatly sympathise with S's view that the whole matter (either way) would have been better left unsaid. Only two people need to know the truth of this allegation and they already do so. Accordingly I decline to make a finding on this point.

23. And so one returns to what is to be done now so far as this family is concerned. Dr.S indicated that one of the real difficulties in these cases was the absence of satisfactory nomenclature, a concern echoed by Black J in the case that I have cited. Either the proposed word has contentions overtones (e.g. anything using 'father') or it misleads somewhat (e.g. reference to 'uncle') or it is simply unwieldy and unusable by a child (e.g. 'male progenitor'). This problem has not been solved. Some have disposed of it by ignoring a male contribution altogether, some have focussed simply on the biological role of the male whilst others have insisted on a true (if limited) species of fatherhood. Miss Joanna Dodson, Q.C. (for CV and S) points out that in the current

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White Paper on the proposals to reform the Human Fertilisation and Embryology Act 1990 the government favours abandoning any presumption in favour of a child having a father.

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24. In my judgment it is essential at this point to put aside the fears, aspirations and feelings of the adults and to try to look at the case through the eyes of a growing boy, as BA is. He will grow up in the family of CV and S and to him that will be unremarkable. However, he will go to school and it will not surely be long before he has questions about a father. The present proposal (reasonable in itself) is that he will be told of the kind man who enabled mummy to have him. He will hopefully grow up knowing his extended family on both sides. He will accordingly know TJ as one of his uncles. The rest of the family (on both sides) knows of course that TJ is more than that as BA will inevitably discover. To avoid this information coming out in an unplanned way, Dr.S wisely advises that BA learns early of the facts of life and of the means by which he came to be. Will it help him, I ask myself, to know also that this uncle is more to him than that? I am sure that it will. The experience of adoption, which surely we must not neglect in other less conventional forms of parenting, is that children often develop a real interest in their natural parents. This is hardly surprising since that person, however small their involvement in the life of the child, has contributed 50% of his genetic make-up. The other powerful lesson from adoption is the need for truth and the avoidance of deceit from the earliest days. Young children rarely have trouble with the truth, however strange it may seem, although the adults around them may do so. However, the discovery in adolescence that they have been duped or misled (as they may choose to see it) may have serious ramifications for family relationships.

25. It is for these reasons that I think that, if it is possible to do, it is strongly in BA's interests to maintain some kind of relationship with TJ. As a bald statement that is not really controversial. Moreover both Dr. S and, more cautiously, the guardian saw such a role particularly where the court has concluded that TJ is genuine in motivation even if clumsily heavy-handed in style.

26. The court must, however, address the question of parental responsibility. It has become a somewhat hallowed process for the court to consider questions of commitment, attachment and motivation. However, as was pointed out in *Re H (Parental Responsibility)* [1998] 1FLR 855 these applications remain subject to the overriding provision of Section 1(1) of the Children Act 1989. That is particularly important where the case is outside the ordinary run of parental dispute on separation. TJ has certainly shown commitment and acceptable motivation and the contact sessions certainly do not preclude developing attachment. Yet this case is different. TJ accepts that CV and S should comprise the nuclear family and that he has no desire to undermine that and I accept the genuineness of that statement. It is, however, wholly inconsistent with the exercise of parental responsibility. Moreover, it is perceived by CV and S, for reasons which I have indicated I well understand, as a direct threat to their autonomy as a family unit. I am satisfied that it would be wholly contrary to the best interests of BA to grant TJ parental responsibility. TJ would undoubtedly seek to exercise it and forcefully to advance his views. CV and S would feel assailed and undermined in their status as parents. The inevitable resulting conflict would bode ill for BA.

27. What then should the court do? Black J granted parental responsibility hedged about with conditions and undertakings. It is permissible to adjourn the application indefinitely. The court could dismiss it or pursuant to Section 1(5) of the Act make no order upon it. On the facts of this case I see no benefit in a restricted grant of parental responsibility. It will raise false hopes in TJ leading to frustration and will fuel all the fears of CV and S leading to conflict. Furthermore I see no basis for adjournment. As I have indicated I share the guardian's view that the matter should be resolved now. This family will derive no benefit from what will be perceived as a Damoclean sword suspended over them. On the other hand I am reluctant to dismiss the application for the essential conditions are fulfilled by TJ, it is simply that it will only work to BA's detriment in this case. Accordingly I have decided under Section 1(5) to make no order; it would certainly not be better for this child to make the order than not to make it – quite the reverse. That making of no order must be treated as a final order and, absent a radical change of circumstances, I cannot see the court revisiting this issue for many years, if at all.

28. That brings me to the question of contact. TJ has a dual role: as uncle and biological father. The fulfilment of an avuncular role needs no contribution from the court; that must be worked out in the ordinary course of extended family life. It is his unique biological position that commands attention for all the reasons set out as I tried to view this through BA's growing eyes. CV adamantly and S slightly less forcefully [illegible] no recognition of TJ's position other than in terms of what they are prepared to tell BA, perhaps some indirect contact and the fulfilment of his ordinary avuncular role in the extended family. TJ on the other hand

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wants a clear, albeit limited, recognition of his unique status. It is clear that the court must make an order as the parties are quite unable to agree anything.

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29. In my judgment, in order to resolve this issue, the court needs to be clear about the purpose of contact. It is not to give TJ parental status in the eyes of BA or indeed anyone else. It is not to allow the development of a relationship which would amount to parental. That would threaten CV and S and would not be consistent with their autonomy as a nuclear family. It follows that contact must not have a feel of regularity to it. On the other hand, it is essential that the door is kept open for BA so that without artificiality he can picture TJ as someone significant but not ordinarily important in his life yet someone with whom (in time and if he so wishes) he can explore the implications of the kind man who enabled him to be and he can ask questions to satisfy his own natural curiosity. The proposal advanced by TJ is inconsistent with my understanding of the purposes of contact and so, at the other extreme, is that proposed by CV and S.

30. I have concluded that my understanding of the purposes of contact can be served by directing that it should occur four times a year of which one may indeed be family gathering but the other three should be individual to BA and TJ. Anticipating the future, I would expect this to be once in each school holiday with the family gathering occurring whenever naturally it would. I think the Christmas contact can be accompanied by Christmas/Birthday card and modest presents. I stress modest because it is essential that generosity does not convey a wrong message. Those three contacts should occur on neutral territory and not in TJ's home. They should last for about 2 hours. A contact centre would be acceptable but in the early stages a known adult may have to be present with TJ whether that be S or another mutually agreed family member. TJ has demonstrated sensitivity in contact and it is vital that he maintains that and does not misuse it by seeking to advance his paternal status. Until BA wants to ask questions or has received information, he may just have to know TJ by his unadorned first name.

31. I appreciate that this will disappoint TJ because he will see it as inadequate opportunity to develop the relationship he would like to have with BA. I appreciate too that CV and S will initially find this both threatening and burdensome. However, I am clear about two matters: first I am satisfied that all three adults have the personal resources to make this work if they choose to do so; and secondly I am satisfied that this provides the best platform for BA to work out his place in the scheme of things given that he has something more complex to deal with than will most his peers. He has to be able to accept and enjoy his conventional nuclear family as such on the one hand whilst being able to sate his natural curiosity on the other.

32. That leaves one final matter. It is agreed on all sides that this family now needs an extensive break from litigation. To that end all agree that I should make an order against all three adults pursuant to Section 91(14) of the Act directing that no application may be made for any order under or variation of an order Section 4 or Section 8 of the Act in respect of BA without first obtaining the leave of the Court. Were any such application to be made, it should be reserved to me if available and not served on any other party. I have considered the guidelines set out in *Re P(Section 91(14) Guidelines)(Residence & Religious Heritage)* [1996] 1FLR 356 C.A. and am satisfied that such an order is proper in this case having in mind especially guidelines 6 and 7. I direct that this order do continue for 5 years. This order has the additional advantage of emphasising that it is not part of a progression but a specific order intended to have long term effect.

33. I confess that I have found this a difficult and perplexing case. It has required the court to tread unfamiliar ground and to make decisions based on what at this stage must be tentative views about the future needs of BA. Nevertheless, I am satisfied that the order of the court best serves these needs as they are presently ascertained and understood. The concept of family is both psychological and biological and in my judgment a court would be unwise not have regard to both aspects.

- Keywords:
- children
- parental responsibility
- surrogacy

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